2013 IL App (3d) 121052-U

Order filed November 1, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

ROBERT FLYNN, Plaintiff-Appellant, v. JOSEPH CERNUGAL, as Court Appointed Special Representative of the Estate of REX ADAMS, deceased (formerly SCOTT BATES, as Special Representative of the Estate of REX ADAMS, deceased), Defendant-Appellee.	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-12-1052 Circuit No. 09-L-270 Honorable Michael J. Powers, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment in favor of the estate of a homeowner in a slip and fall case was upheld on appeal because, although there was evidence of prior water accumulations in the homeowner's basement, there was no evidence establishing a genuine issue of material fact that the homeowner had actual or constructive notice of water accumulations at the landing at the bottom of his basement stairs, where his son-in-law slipped and fell in water.

¶ 2 The plaintiff, Robert Flynn, appealed from an order granting summary judgment in favor of the defendant, Joseph Cernugal, the court-appointed special representative of the estate of the deceased, Rex Adams, in a premises liability action seeking damages for injuries sustained in a fall in Adams' home.

¶ 3 FACTS

¶ 4 The plaintiff (Mr. Flynn), his wife, and his two daughters took a trip to visit Mrs. Flynn's father (Adams) in Morton, Illinois, arriving around 3 or 4 pm on Saturday, March 31, 2007. That evening, the Flynns and Adams went out for dinner with Mrs. Flynn's sister and her family. According to Mrs. Flynn, from the time they arrived at Adams' home until the time they went to dinner, she did not recall anyone going into the basement. After dinner, the sister and her family went home, and the Flynns and Adams returned to Adams' home. Mrs. Flynn did not recall anyone going into the basement between dinner and bedtime.

¶ 5 The next morning, the plaintiff went to the basement to take a shower. There was no shower on the main floor. He was wearing a t-shirt, sweat pants, and white socks. To his knowledge, he was the first one to go down to the basement that day. When he stepped off of the carpeted landing onto the tile at the bottom of the stairs, he slipped and fell. He did not recall noticing any water beforehand, but, after he fell, the back of his sweat pants and t-shirt were wet. While on the floor, the plaintiff noticed accumulations of water on the tile. He did not have any idea how long the puddles of water had been there, and he did not know where the water came from. He went back up the stairs, and told Adams that he had fallen. The plaintiff then went into his bedroom and told his wife that he had fallen in water at the bottom of the basement stairs. Mrs. Flynn observed that the back of the plaintiff's sweat pants and t-shirt were wet. The plaintiff

did not go to church with the family, and the Flynns left to go home later that afternoon.

¶ 6 Mrs. Flynn testified in her discovery deposition that Adams still lived in the house that her family had moved into in 1959. As of March 31, 2007, Adams was living in the house by himself. She testified that there had always been seepage of water in the basement, particularly after a hard rain. She estimated that there was water in the basement on average once a month. Adams tried to remedy the situation by running two dehumidifiers, one in the laundry room and one in the carpeted area of the rec room. Also, Mrs. Flynn and Adams had occasionally mopped up water in the basement. Mrs. Flynn testified that the plaintiff was aware that there was water from time to time in Adams' basement. According to Mrs. Flynn, Adams always took a shower, rather than a bath, so he usually went to the basement every day for a shower. She testified in her deposition that she did not think that anyone went into the basement on March 31. She was still in bed when the plaintiff fell on the morning of April 1, but she did not recall Adams going into the basement at any time before the plaintiff's fall.

¶ 7 Kelsey Flynn, the Flynns' older daughter, who was 16 years old at the time of the fall, testified in her deposition that she recalled there being water in the basement on prior occasions, particularly in the carpeted area at the far side of a ping pong table. She did not remember seeing water adjacent to the landing at the bottom of the stairs. She was not sure, but she thought that she and her sister had gone into the basement during their visit to play ping pong. She could not remember if the carpet by the ping pong table was wet on that occasion. Korey Flynn, the Flynns' other daughter, who was almost 14 years old at the time of her father's fall, could not recall if she went into the basement at all during the visit.

¶ 8 Mrs. Flynn's sister, Mary Mellon, testified in her deposition that she was at her father's

house, and she went into the basement, on the morning of the plaintiff's fall and the two days prior. She did not notice any water or moisture in the basement on any of those days.

¶ 9 The plaintiff filed a two-count amended complaint against Adams' estate (Adams died in 2008), alleging negligence and *res ipsa loquitur*. After fact discovery as to the issue of liability was concluded, the defendant filed a motion for summary judgment, arguing that Adams had no actual or constructive notice of the presence of water by the landing in the basement, and thus owed no duty to the plaintiff. The trial court granted the motion, and the plaintiff appealed.

¶ 10 ANALYSIS

¶ 11 The plaintiff argues that there were genuine issues of material fact that precluded summary judgment, particularly with respect to whether Adams had actual or constructive notice of the water in the basement.

¶ 12 Summary judgment is appropriate when the pleadings, depositions, affidavits, and admissions show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90 (1992). Although a plaintiff is not required to prove his case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment. *Robidoux v. Oliphant*, 201 Ill. 2d 324 (2002)(citing *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243 (1996). We review *de novo* the grant of summary judgment. *Outboard Marine Corp.*, 154 Ill. 2d at 101.

¶ 13 Under certain circumstances, a possessor of land can be held liable for physical harm caused to an individual present on the land by a condition on the land or by the acts of third

persons. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422 (2006). A possessor of land is liable for injuries to his invitees caused by the physical condition of his land if he: (1) knew or should have known of the condition; (2) should have expected that the invitee would not discover or realize the danger, or would fail to protect himself against it, and (3) failed to exercise reasonable care to protect him against the danger. *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711 (2010))(citing Restatement (Second) of Torts § 343 (1965)). Thus, if the possessor of land did not create the condition, the plaintiff must establish that the possessor had notice, either actual or constructive, of the condition. *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033 (2000). While a plaintiff does not need to prove actual or constructive notice when he can show the substance was placed on the premises through the defendant's negligence, *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712 (1998), that was not alleged in this case.

¶ 14 The plaintiff's evidence was insufficient to establish that Adams had actual knowledge of the water at the bottom of the basement stairs on the morning of April 1. No one testified that Adams was made aware of the puddles of water in the basement before the plaintiff fell. The plaintiff testified that he believed that he was the first person to go into the basement that day. One of the daughters testified that she remembered going into the basement on that visit, but she did not remember noticing any water on the floor. The other daughter could not recall if they even went into the basement. Mrs. Flynn did not think anyone had been in the basement before the plaintiff's fall, other than it was Adams' custom and practice to take a shower every day, and the only shower was in the basement. However, she did not know if he actually took a shower the morning of the plaintiff's fall. Mrs. Flynn's sister testified in her deposition that she was at the house the day before, and the morning of the fall, and she was in the basement, and she did

not notice any water on the landing. While there seems to be some credibility issues with regard to Mrs. Flynn and her sister, such issues are not for us to decide on summary judgment. See *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390 (2008) (a trial court does not decide questions of fact on summary judgment, but only determines whether such questions exist, so the trial court does not make credibility determinations nor weigh evidence in deciding such motions). Looking at the evidence in a light most favorable to the plaintiff, the nonmoving party, there was still no evidence establishing a factual basis to find that Adams had actual notice of a water accumulation at the bottom of his basement stairs on the morning of April 1, 2007. See *Johnson v. Harris*, 374 Ill. App. 3d 473, 475 (2007) ("When ruling on a motion for summary judgment, we construe all evidence in a light most favorable to the nonmoving party").

¶ 15 Whether a condition existed for a sufficient period to impute constructive notice upon a home owner is usually a question of fact, but it becomes a question of law if the evidence viewed most favorably to the plaintiff so overwhelmingly favors the defendant so that no contrary finding on the evidence could stand. *Mazzone v. Chicago & North Western Transportation Co.*, 226 Ill. App. 3d 56 (1992). Constructive notice exists if a substance is there for a long enough period of time that it would have been discovered through the exercise of ordinary care. *Thompson v. Economy Super Marts*, 221 Ill. App. 3d 263 (1991). There was no evidence to establish how long the water was on the floor. The plaintiff argues, however, that the history of water seepage in the basement was sufficient to give Adams constructive notice of water on the floor of the basement.

¶ 16 Although there was evidence that the basement had a history of water problems, there was no evidence that there was ever water in the place where the plaintiff slipped and fell. Thus,

there was no evidence to impute constructive notice on Adams as to water on the landing at the bottom of the stairs. All of the evidence regarding water seepage related to water in the rec room or in the laundry room. Without notice, there was no duty to warn nor to remove the water, and summary judgment was proper.

¶ 17 The defendant argues that the doctrine of *res ipsa loquitur* is inapplicable because the precise cause of the injury, i.e., water on the tiled floor, was known. Also, the defendant argues that Adams did not have exclusive control of the basement.

¶ 18 Whether the *res ipsa loquitur* doctrine should apply is a question of law. *Heastie v. Roberts*, 226 Ill. 2d 515 (2007). The doctrine requires that (1) the occurrence is one that ordinarily does not occur in the absence of negligence; and (2) the defendant had exclusive control of the instrumentality that caused the injury. *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 1009 (2008). "[T]he doctrine is simply a rule of evidence relating to the sufficiency of plaintiff's proof." *Britton*, 382 Ill. App. 3d at 1011. The doctrine involves a type of circumstantial evidence that permits a trier of fact to infer negligence when the precise cause of the injury is not known by the plaintiff and the direct proof is in the control of the defendant *Rodgers v. Withers*, 229 Ill. App. 3d 246 (1992). There was no dispute that the plaintiff slipped on water in the basement; there was also evidence that other people may have been in the basement before the fall. Thus, the doctrine of *res ipsa loquitur* has no application to this case.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Will County is affirmed.

¶ 21 Affirmed.